Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

July 2004

Laws dealing with parental rights and duties continue to trail real life situations. In *Elisa B. v. Superior Court (Emily B.)* (Cal. App. Third Dist., May 20, 2004) 118 Cal. App. 4th 966, [13 Cal. Rptr. 3d 494, 2004 DJDAR 5990], the Third District Court of Appeal dealt with the question whether a person in a same-sex relationship, who encouraged her partner to give birth to twins by artificial insemination and who held the child out as her own, could be required to pay child support after the couple split up. The court answered the question in the negative. The Uniform Parentage Act (*Fam. Code*, §7600 ff.) did not apply. The court also rejected biological mother's argument that the duty to support arose under a theory of promissory estoppel.

Successive owners may be entitled to recover for construction defects. Unless there is proof that the original owners suffered actual economic damages from construction defects, a subsequent owner may recover such damages from the builder. *Siegel v. Anderson Homes* (Cal. App. Fifth Dist., May 20, 2004) 118 Cal. App. 4th 994, [13 Cal. Rptr. 3d 462, 2004 DJDAR 6005].

Compliance with Tort Claims Act, or excuse from compliance, must be plead. Recent decisions of our appellate courts reached inconsistent results in answering the question whether, in actions against governmental entities, compliance with the Tort Claims Act claim procedures (*Gov. Code*, §900, et seq.) must be alleged by plaintiff in the complaint or whether failure to comply is an affirmative defense to be plead by the defendant in its answer. Our Supreme Court decided the issue in *State of California v. Superior Court* (Cal.Supr.Ct., May 24, 2004) 32 Cal. 4th 1234, [90 P.3d 116, 13 Cal. Rptr. 3d 534, 2004 DJDAR 6138], stating that facts demonstrating compliance with, or excuse from compliance, must be asserted in the complaint. Failure to do so renders the complaint subject to general demurrer.

No piece-meal summary adjudication in actions for malicious prosecution. Summary adjudication of issues (*Code Civ. Proc.*, §473(f)(1)) is generally limited to orders that dispose of an entire cause of action. (There are exceptions, however, check the statute.) As a result, summary adjudication is not available in an action for malicious prosecution, on the grounds that some, but not all, claims in the underlying action were supported by probable cause. *Hindin v. Rust* (May 24, 2004) 118 Cal. App. 4th 1247, [13 Cal. Rptr. 3d 668, 2004 DJDAR 6163].

Lawyer is not necessarily disqualified because spouse may have a conflict. Following *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, [115 Cal. Rptr. 2d 847, 2002 DJDAR 1063], the Third Appellate District, in an opinion by Justice Morrison confirmed that lawyers will not be presumed to have disclosed confidential information to their spouses or other persons with whom they have a close personal relationship. Therefore, a lawyer was held to not be disqualified from a case solely because of his marriage to a lawyer whose firm had previously been disqualified. *Derivi Construction & Architecture, Inc. v. Wong* (Cal. App. Third Dist., May 25, 2004) 118 Cal. App. 4th 1268, [2004 DJDAR 6214].

New amendment to the anti-SLAPP statute applies retroactively. Three cases have held that newly enacted *Code Civ. Proc.* §425.17, which essentially eliminates the anti-SLAPP remedy of *Code Civ. Proc.* §425.17 in commercial and public interest cases, is to be applied retroactively. In all three cases, the appeal was already pending when the new statute became effective. The cases used different rationales to reach the same result: (1) the new statute constitutes a partial appeal of a remedial statute, therefore, the normal rules against retroactive application do not apply; (2) the new statute merely clarifies the existing statute; and (3) the statute is procedural only. *See, Physcians Committee for Responsible Medicine v. TysonFoods,*

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Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com

Litigation Section Events

2004 State Bar of California Annual Meeting

October 7–10, 2004
Monterey, CA

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Inc. (Cal. App. First Dist., Div. 1, June 2, 2004) 119 Cal. App. 4th 120, [13 Cal. Rptr. 3d 926, 2004 DJDAR 6501]; *Metcalf v. U-Haul International, Inc.* (Cal. App. Fourth Dist., Div. 3, May 24, 2004) 118 Cal. App. 4th 1261; [13 Cal. Rptr. 3d 686, 2004 DJDAR 6176]; *Brenton v. Metabolife International* (Cal. App. Fourth Dist., Div. 1, March 4, 2004) 116 Cal.App.4th 679, [10 Cal. Rptr. 3d 702, 2004 DJDAR 2890].

Primary assumption of risk is not limited to sports activities. Although most cases involving primary assumption of risk involve injuries sustained in athletic events, the doctrine is not limited to these cases. Where plaintiffs' occupation requires them to deal with the very risk that causes the injury, the doctrine applies. For example, in *Averill v. Superior Court* (Cal. App. Fourth Dist., Div. 3, Feb 23, 1996) 42 Cal.App.4th 1170, [50 Cal. Rptr. 2d 62], the court applied the doctrine where the caretaker of an Alzheimer patient was attacked by the patient. Several cases, including recently decided *Priebe v. Nelson* (Cal. App. First Dist. Div. 4, June 8, 2004) 119 Cal. App. 4th 235, [2004 DJDAR 6760], have held that those who assume professional care of animals are subject to the doctrine. Another line of cases deal with what is generally referred to as the "firefighter's rule," *see e.g., Hamilton v. Martinelli & Associates Justice Consultants, Inc.* (Cal. App. Fourth Dist., Div. 2, July 23, 2003) 110 Cal.App.4th 1012, [2 Cal. Rptr. 3d 168]. This rule, is but another application of the primary assumption of risk doctrine.

Charging lien agreement is subject to Rule 3-300. When lawyers wish to secure payment of fees and costs by obtaining a charging lien against a client's future recovery, they must obtain the client's written consent. Such a lien is subject to the requirements of *Rules of Professional Conduct*, Rule 3-300 requiring the client's informed written consent before lawyers may acquire interests adverse to their clients. *Fletcher v. Davis*, Case S114715 (Cal., June 10, 2004), 33 Cal. 4th 61, [90 P.3d 1216, 2004 DJDAR 6870]; Time for granting or denying rehearing extended . *Fletcher v. Davis,* Case S114715 (Cal., July 2, 2004).

Conflict between statute and Rules of Professional Conduct resolved. In June, 2004, our Supreme Court adopted changes to the *Rules of Professional Conduct*, rule 3-100; The new rule allows lawyers to breach client confidences to prevent a crime involving death or substantial bodily harm. The new rule is consistent with newly enacted legislation requiring such disclosure. The rule requires that, before making the disclosure, the lawyer must make a good faith effort to persuade the client not to commit the crime and provides specific factors the lawyer must consider before making the disclosure.

ALERT: California power to exercise jurisdiction over Nevada hotels before the Supreme Court. In our May Newsletter we reported on *Snowney v. Harrah's Entertainment, Inc.* (2004) 116 Cal.App.4th 996, 11 CalRptr.3d 35, which held that defendants who operate Nevada hotels and advertise in California, and engage in other activities purposefully directed at California residents are subject to the jurisdiction of the California courts. The California Supreme Court has granted hearing (June 30, 2004) [2004 DJDAR 8089] so the case may no longer be cited as precedent.

Mind your P's and A's. Points and authorities must follow state rule format. The trial court may not reject a memorandum of points and authorities as long as it satisfies the requirements of *California Rules of Court*, rule 313 (b). In *Hope International University v. Superior Court* (Cal. App. Fourth Dist., Div. 3, June 18, 2004) [2004 DJDAR 7406] the trial court declined to rule on a motion for summary adjudication of issues (*Civ.Proc.* § 437c) because the memorandum of points and authorities were not organized in a manner required by the judge. The Court of Appeal held that this was not a proper basis for the ruling. As long as the memoranda of points and authorities satisfy Rule 313 (b), the court must hear and consider the motion. (*Also see, Cal. Rules of Court*, rule 981.1.)

There are limits on a lawyer's representing parties adverse to a former client. *Farris v. Fireman's Fund Ins. Co.* (Cal. App. Fifth Dist., June 18, 2004) [2004 DJDAR 7318] held that a lawyer who had previously represented Fireman's Fund in bad faith cases, was disqualified from pursuing such a case against that insurer. Citing *Jessen v. Hartford Casualty Insurance Company* (2003) 111 Cal.App.4th 698, [3 Cal. Rptr. 3d 877] the court held that a lawyer is disqualified from representing an interest adverse to that of a former client if two tests are met: (1) was the lawyer's former representation personal and direct, and (2) was there a substantial relationship between the nature of the work done for the former client and that sought to be done for the new client? If both of these are answered in the affirmative, the lawyer is disqualified.